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No. 0

IN THE

SUPREME COURT OF THE UNITED STATES

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October Term, 1982

COMPANIA DE GAS
DE NUEVO LAREDO, S.A.,

PETITIONER,

VS.

ENTEX, INC.,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT

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Questions Presented For Review

1. Did the Court of Appeals correctly hold that the act of state doctrine precludes a review of the Mexican government's taking possession of Petitioner's assets in Mexico?
2. Did the Court of Appeals correctly hold that Petitioner was collaterally estopped from relitigating the question of federal preemption over the price of gas determined by the Texas Railroad Commission?
3. Did the Court of Appeals correctly hold that Respondent had no contractual duty to institute litigation against Respondent's previous gas supplier in an attempt to minimize increases in the price of gas sold by Respondent to Petitioner?

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Statement of the Case

Petitioner's "Statement of Fact" in its Petition to this Court is generally incomplete and misleading as a statement of the case. Respondent therefore relies upon the Fifth Circuit's opinion below for a true exposition of the operative and dispositive facts.^{1/}

^{1/} As an example of a misleading statement, Petitioner states on page 7 that its contentions before the Federal Energy Regulatory Commission were rejected by the Administrative Law Judge. In fact, the ALJ, the Agency and the Court of Appeals for the D. C. Circuit rejected its arguments. See Compania de Gas de Nuevo Laredo, S.A. v. Federal Energy Regulatory Commission, 606 F.2d 1024 (D.C. Cir., 1979).

As a further example of the misleading nature of Petitioner's "Statement of Fact", the Petition is replete with argument that Respondent committed unnamed acts of "corruption" in its relations with the Republic of Mexico.

[Footnote ^{1/} continued on next page]

Summary of Argument

Petitioner argues, first, that this Court should engraft a "corruption exception" to the act of state doctrine. This proposed "exception" is calculated to and assuredly

Footnote 1/ (continued from previous page)

As the record itself reflects, there has never been any showing nor any evidence, of any kind or character, of any corrupt act or other wrongdoing by Entex or its counsel, or by the President or any other governmental official of the Republic of Mexico. Such statements in the Petition, in fact, are simply untrue and are regurgitated in an obvious attempt to lend credence to Petitioner's claim for relief. As the Court of Appeals specifically concluded in its opinion, . . . "the Mexican government, by taking possession of [Petitioner's] assets, acted in an emergency to insure that the citizens of Nuevo Laredo receive uninterrupted service of natural gas." Compania de Gas de Nuevo Laredo, S.A. v. Entex, 686 F.2d 322, 326 (5th Cir. 1982).

will exasperate the very harm the doctrine is specifically intended to avoid. In the total absence of any proof or showing of corruption of any sort in the record below, no such "exception" should be created or entertained by this Court. In this case, there is and was no corruption of any kind.

Second, Petitioner contends that this case involves a question concerning Federal preemption of State regulation of gas prices. The Court of Appeals and the District Court both have held that the Petitioner, having previously litigated these contentions and lost, is now collaterally estopped from relitigating those same issues. Collateral estoppel was correctly applied by the Courts below.

Lastly, the Courts below correctly held that Petitioner's contract law argument (i.e., that Respondent should be forced to sue its gas suppliers for allegedly "unlawful" and "impermissible" gas price increases which were passed through to Petitioner) is insupportable under the applicable State law. Further it is obvious that this assertion raises no Federal concern and involves only particular conduct of the parties under a specific contractual provision.

Argument

I.

Act of State Doctrine

Petitioner contends that the act of state doctrine should be subject to an exception, in favor of foreign private citizens, "when [foreign] governmental

acts in question are procured through corruption." The only support cited is dictum found in one District Court case 2/ bolstered by arguments of Petitioner's own creation. In short, Petitioner claims that foreign relations with other nations would be enhanced because of the gratitude those nations would have toward the United States if its courts would assume jurisdiction to investigate and expose corrupt practices taking place within a foreign nation.

The opinion of the Fifth Circuit concerning this "issue" is both well considered and correct. In this case, there was no corrupt act of any kind. Further, as this Court has recognized

2/ Dominicus Americano Bohio v. Gulf & Western Industries, Inc., 473 F.Supp 680 (S.D.N.Y. 1979).

since 1917, Oetjen v. Central Leather Corp., 246 U.S. 297, it is central to the doctrine that the very fact of inquiry into the conduct of the affairs of a foreign sovereign is potentially officious and offensive. Finally, the inquiry is foreclosed because, as in this case, our courts are without power to remedy the supposed or alleged wrong.^{3/} But the central fallacy of Petitioner's argument here is the total absence of any proof or evidence in this proceeding of any corruption or wrongdoing by any foreign official or by Entex or its representatives in dealing with the Republic of Mexico in connection with the matters at issue.

^{3/} For example, Petitioner has yet to pay one cent of the costs taxed against it in any of the protracted agency and court proceedings filed by it in this controversy.

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Petitioner's second argument, that the Foreign Corrupt Practices Act (Pub. L. No. 95-213, 91 Stat. 1494 (1977) codified in various sections of 15 U.S.C.) is not "fair and just [in] that only the U.S. Justice Department, under CPA, can have an exception to the act of state doctrine to investigate and prosecute corrupt foreign officials in criminal proceedings" Petition, p. 13. This argument should be addressed to Congress, not the Court.

Finally, in attempting to bolster its specious arguments, Petitioner argues that the Sovereign has authorized or "consented" to an adjudication of the "corruption" issue in the U.S. Courts. Petitioner relies upon a single piece of correspondence in the record, written to Petitioner's counsel by the Official Administrator of

Petitioner's company, as establishing that the Republic of Mexico had waived its sovereignty and has granted to the Courts of the United States the power to terminate the receivership over Petitioner's company established by decree of the President of the government of Mexico in 1976. This is ludicrous on its face.

In summary, Petitioner's argument with respect to the creation of a private remedy in the Courts of the United States whenever unproven allegations of "corruption" are lodged against the officials of a foreign sovereign by one of its citizens are totally devoid of any merit. The decisions of the Courts below are clearly correct. The Petition should be in all things denied.

II.

Collateral Estoppel

The Court of Appeals properly declined to address the merits of the regulatory issues which Petitioner is asking this Court to pass upon in the second part of its argument in brief. The court below held that Petitioner was collaterally estopped from relitigating these issues, citing earlier dispositive action on such issues by the Federal Energy Regulatory Commission and the Court of Appeals for the District of Columbia. Compania de Gas de Nuevo Laredo, S.A. v. Federal Energy Regulatory Commission, 606 F.2d 1024 (D.C. Cir. 1979). The discussion by the Court of Appeals is correct and the matter need not be discussed again, just as the regulatory matters raised by Petitioner need not be litigated again.

III.

Texas Contract Law and "Good Faith"

Petitioner's third point, that Respondent breached its gas sales agreement with Petitioner by failing in "good faith" to sue the predecessor-in-interest to Respondent's gas supplier for breach of contract--a course of action Petitioner posits would have kept down Petitioner's gas costs--arises under Texas contract law and involves no considerations listed in Rule 17 as justifying further review by this Court. Petitioner's totally unsupported observation at page 28 of its petition that "this type of situation is probably common across the nation," as indicative of a significant "federal" question, does nothing to alter this conclusion. In any event, review by this Court of the state law question would

have very limited impact because the issue raised, contractual "good faith," is determined on a case-by-case basis. Respondent therefore urges the Court to dismiss the petition as to this point.

Conclusion

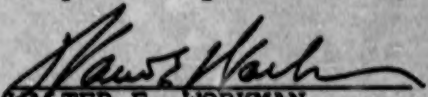
Respondent urges the Court to dismiss Petitioner's petition for writ in its entirety. The Court of Appeals correctly decided all three issues before this Court. The single issue which warrants even cursory attention -- and resolution of which is clear upon analysis -- concerns the corruption exception to the act of state doctrine. The other two issues involve either a clear instance of collateral estoppel or state, not federal, law. Respondent has argued that recognition by this Court of this exception would be

contrary to precedent (except for one district court case), unwise, because contrary to the purposes of the doctrine, and otherwise not appropriate in this case.

The Petitioner's Petition for Writ of Certiorari should therefore be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of this brief are being served upon counsel for Petitioner, Messrs. C. M. Zaffirini and E. R. Cuellar, at the firm of Zaffirini and Cuellar, P. O. Box 627, Laredo, Texas 78042-0627, on February 18, 1983, in accordance with the rules of this Court.


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